

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

RIALTO UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2014040982

**EXPEDITED DECISION**

Student, by and through his legal guardian, filed a Due Process Hearing Request on April 21, 2014, which stated claims that required both an expedited hearing and a non-expedited hearing.<sup>1</sup> On May 30, 2014, the non-expedited hearing in this matter was continued at the parties' joint request to September 8, 2014.

Clifford H. Woosley, Administrative Law Judge , Office of Administrative Hearings , State of California, timely heard the expedited portion of this matter in Rialto, California, on May 20, 21 and 27, 2014.

Attorney Michael Smith appeared on Student's behalf. Student's guardian was present throughout the hearing.

Attorney Karen E. Gilyard represented District; Attorney Joanne Kim attended the first day of hearing. Special Education Coordinator Veronica Smith-Iszard attended on behalf of District. East Valley Special Education Local Plan Area Program Director, Laura Chism, attended for two hearing days.

On May 27, 2014, the hearing concluded and the record remained open to allow the filing of written closing argument. The parties timely filed briefs on June 5, 2014, at which time the record was closed and the matter submitted.

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<sup>1</sup> OAH set the expedited and non-expedited claims for separate hearings. The expedited claims proceeded to hearing with no continuances. (34 C.F.R. § 300.532(c)(2).) .

## ISSUES

1. Was District required to conduct a manifestation determination, pursuant to Title 20 United States Code section 1415(k)(1)(E),<sup>2</sup> as a result of the April 2012 school attendance review board proceeding concerning Student's attendance?

2. If so, was the conduct that formed the basis of the April 2012 student attendance review board proceedings a manifestation of Student's disability?<sup>3</sup>

## SUMMARY OF DECISION

Student met his burden of proof on Issue One and demonstrated District was obligated to conduct a manifestation determination, as proscribed by section 1415(k)(1)(E). District's student attendance review board determined that Student, who was eligible for special education, violated the code of student conduct requiring regular attendance and as a result, changed Student's placement. Section 1415(k), which requires a manifestation determination meeting, applies to any violation of a code of student conduct that could result in change of placement.

Student met his burden of proof on Issue Two. Student demonstrated that the conduct that formed the basis of the review board action was a manifestation of Student's disability. Student's primary special education eligibility was emotional disturbance. Student refused to enter class, would leave class without warning, attempted to bolt from the campus, required physical restraint on a number of occasions, was openly defiant, would be nonresponsive and withdrawn, was aggressive, and generally exhibited resistance to authority and structure. District recognized and documented in Student's IEP, which occurred before the attendance review board meeting, that Student's behaviors caused him to avoid and miss classes. District drafted and recommended a behavior goal to encourage Student to attend. Considering the information in Student's file, which was available at the time of the change of placement, Student's absenteeism was a manifestation of his disability.

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<sup>2</sup> All code section references are to Title 20 of the United States Code, unless otherwise designated.

<sup>3</sup> Student's complaint also alleged, and the prehearing conference order set forth, these same two issues with regard to a September 2012 school attendance review board proceeding. Student did not present evidence and did not make any argument regarding September 2012 school attendance review board proceedings. Therefore, those issues are deemed withdrawn and this decision does not address those issues.

## FACTUAL FINDINGS

1. At the time of hearing, Student was a 14-year-old eighth grader who first became eligible for special education services in 2005. His maternal grandmother had been his legal guardian (Guardian) since he was a toddler, along with his older sister and brother.<sup>4</sup> Student, his brother, and Guardian had been homeless for many years and at all times relevant to this decision. Guardian enrolled Student as a sixth grader at District's Kolb Middle School (Kolb) on or about January 11, 2012.

2. Prior to enrolling in District, Student had attended multiple school districts with a history of irregular attendance and disciplinary reports, suspensions, and some manifestation determinations. In April 2008, Student enrolled at Claremont Unified School District (Claremont USD), which conducted an IEP dated March 18, 2009. This IEP identified Student's primary eligibility as emotional disturbance, with a secondary eligibility of other health impaired, due to attention deficit and hyperactivity disorder (ADHD). Student had also attended school at home and with California Virtual Academy.<sup>5</sup>

3. Upon enrollment at Kolb in January 2012, Guardian informed District that Student had an IEP and provided names of prior school districts. Guardian told the Kolb assistant principal that Student got anxious in class and would often leave the class or campus. She reported that Student had ADHD, required a one-on-one aide, and always had emotional disturbance listed as his eligibility on his IEP's. Beginning in February 2012, Kolb provided a one-on-one aide to accompany Student throughout the school day. Guardian provided District with a mailing address, phone number, and email address. Guardian was homeless and testified that the mailing address was only a post box;<sup>6</sup> she preferred to be contacted by email or phone.

4. The March 2009 IEP, from Claremont USD, was Student's current IEP at the time he enrolled at Kolb in January 2012.

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<sup>4</sup> The hearing in this case was held concurrently with the expedited portion of OAH case number 2014040978. A separate expedited decision concerning Student's brother in that case was issued on August 13, 2014.

<sup>5</sup> CAVA schools offer online curriculum by credentialed teachers. CAVA students do not attend a physical campus or school building but, instead, participate via computer.

<sup>6</sup> Guardian asserted that, sometime before April 2012, she told District that the mailing address was no longer any good. However, Guardian did not provide District with a different mailing address and no documentary evidence indicated Guardian changed her mailing address.

5. School Nurse Kerry Rafferty-Hull testified at the hearing. She had worked 12 years for District. She was a licensed registered nurse and held both a public health nurse credential and a school nurse credential. Ms. Rafferty-Hull's duties included monitoring the health of students and providing health assessments in special education. On January 12, 2012, she conducted a vision and hearing screening of Student; he passed both. On the same day, Ms. Rafferty-Hull interviewed Guardian, who said Student had been diagnosed with ADHD, depression, and anxiety, with a history of aggressive and violent behavior. Student had neutropenia (low white count), but was not being treated at that time. Guardian reported that Student was prone to asthma, which would result in a cough, triggered by low white count and cold weather. Guardian also said Student was allergic to pork and soy.

6. The nurse did not find medical diagnosis documentation for ADHD, depression, anxiety or allergies in Student's records. Ms. Rafferty-Hull gave Guardian a "Release of Information" form to complete and sign, authorizing her to contact Student's doctors. She also provided a Medication in Schools form so Student could use an inhaler in school for his asthma. Guardian took the forms to complete but never returned them. Guardian testified that no one from District ever asked her to sign an authorization for access to Student's medical records. However, Ms. Rafferty-Hull documented that she provided the release to Guardian in Student's health assessment report. Further, she convincingly testified that she provided the release because it was her standard practice to do so when a parent referred to an undocumented medical diagnosis.

7. By letter dated January 12, 2012, Guardian requested that District hold an IEP meeting for Student. Guardian hand delivered the letter to District's Psychological Services Department, having already asked for the IEP's the previous day at Kolb. The Psychological Services' clerk typist sent an email to Kolb school psychologist Terrilynn Bryant, informing her of Guardian's written request for an IEP for Student, noting Guardian's letter was in Ms. Bryant's school mailbox. District prepared an Assessment Plan for Student, which Guardian signed and returned on January 20, 2012.

8. Angela L Brantley had been the Senior Coordinator of District's Child Welfare and Attendance program for four years and worked for District almost 17 years. She testified at the hearing. Her duties included that of District facilitator for the expulsion process, District mediator for student suspension intervention, chairperson for District's attendance review board, and the McKinney-Vento District liaison.<sup>7</sup> Her past positions included elementary school principal, elementary administrator, math teacher and math coach. She held credentials in administrative services, single subject secondary mathematics teaching, and cross-cultural language and academic development.

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<sup>7</sup> The McKinney-Vento Homeless Education Assistance Act (42 U.S.C. § 11431, et seq.) is a federal law that provides federal funding for the needs of the homeless and requires districts to ensure homeless students have access to education and other services they need to meet the same academic achievement standards as all students. All local school districts must designate a Homeless Liaison.

9. As the McKinney-Vento liaison, Ms. Brantley interacted with Guardian on many occasions. Guardian requested school supplies, backpacks, shoes, and clothing for Student and his younger brother. Ms. Brantley provided these items. Ms. Brantley gave Guardian bus passes for Student and his younger brother, as well as a bus pass for Guardian because Guardian said she needed to accompany the boys on the bus.

10. Student was soon involved in various disciplinary incidents, some of which resulted in formal reports; most concerned Student's refusal to attend classes. On the first day of school, Student would not go to class. Guardian took him home with the hope he would start the next day. On January 17, 2012, Student stood in the school hallway and refused to go to class. When a school security officer tried to talk to him, Student would not respond, repeatedly saying, "I don't care" and "I'm not moving." When Kolb administrator, Lazaro Serno, attempted to escort Student to the school office, Student through his arm back and threatened to slap Mr. Serno. Two school security officers were required to move Student to the school offices, where Student made additional threats; staff called Guardian.

11. On January 23, 2012, school security found Student wandering the halls during class time, with a sharp pencil in each hand. When taken to Mr. Serna's office, Student refused to talk or cooperate and would not release the sharp pencils. When the school security officer physically removed the pencils, Student became violent, calling the officer names while attempting to acquire other sharp objects both in and outside Mr. Serna's offices. The security officer physically retrained Student.

12. Kolb assistant principal, Margaret Simmons, addressed a January 30, 2012, Initial Notification of Excessive Absences to Guardian at the mailing address provided by Guardian. Ms. Simmons informed Guardian that Student's five absences over the prior two weeks were excessive, though some were excused. She noted that absences could become an increasingly difficult habit, affecting Student's academic and social progress, and offered the school's services in addressing the problem.

13. On January 31, 2012, Student was corrected for leaving and returning to a class assignment. Student refused to cooperate, left the class, and roamed about the campus, repeatedly returning, exiting, and disrupting the classroom. When escorted to the school office, Student was laughing and wanted to leave school. On February 8, 2012, Student refused to follow staff directions and spit on the discipline office's door, climbed through a window into the attendance office, entered the staff lounge and pounded on the vending machines, left the campus, and ran into the street.

14. By letter dated February 14, 2012, Ms. Simmons sent Guardian a Second Notification of Excessive Absences, noting 10 full days of absences by Student. The letter stated further steps were needed to address the problem, and warned that continued absences would result in a referral to the School Attendance Review Team and that regular school attendance is a requirement for public assistance through the California Work Opportunity and Responsibility to Kids program.

15. Due to Student's absences, Ms. Bryant had minimal interaction with Student. She was unable to conduct the assessments before District convened a 30-day IEP meeting on February 17, 2012. Ms. Bryant attended the IEP meeting, taking notes. Also attending was Bridgette Ealy, special education coordinator and program specialist; she also testified at the hearing. The IEP team discussed Student's performance, as well as his conduct and absences. The IEP document proposed a behavior goal (one of five goals), which was designed to address Student's chronic elopement. The goal's baseline note, which was based on discipline logs, stated that Student left the classroom every day and would exit the general classroom area three to four times a week, requiring the intervention of school security. The goal and objectives were to involve Student in dialogue regarding his elopement instead of leaving the classroom or campus.

16. The IEP proposed an eligibility of emotional disturbance, citing findings and the recommendation of a psychological report of November 24, 2008. District offered placement in a special day class for students with emotional disturbance for three periods a day and general education for three periods, with one-on-one aide support, weekly group counseling, and accommodations. District IEP team members also proposed including a behavior support plan to address Student's anger issues and lack of self-control. District IEP team members believed that Student was capable, but he required further specialized instruction to access his academics and assure regular attendance. The meeting was continued to March 9, 2012,

17. On February 21, 2012, Ms. Simmons sent a Third Notification regarding Student's continuing absences, which informed Guardian that she and Student were referred to the School Attendance Review Team for a mandatory meeting on March 27, 2012. This letter made reference to Education Code section 48262, which set forth the definition of a habitual truant.

18. The IEP team reconvened on March 9, 2012, for a second session. Guardian disagreed with District's offer of FAPE and did not sign the IEP.

19. Neither Guardian nor Student appeared at the March 27, 2014 meeting. Therefore, on March 28, 2014, Ms. Simmons and Kolb principal Monique Means referred Student to the School Attendance Review Board. They prepared a written referral summary. Ms. Simmons and Ms. Means unambiguously identified Student as a sixth grade special education student at Kolb. Student had 190 period absences; he had missed 33 days of the 42 days he had been enrolled at Kolb. In the last grading period, Student had "no grade" in all of his academic classes due to his absenteeism.

20. Kolb prepared an attendance review board meeting packet, which included District's "School Attendance Review Board Referral" form. This form was the "cover sheet" for the meeting packet. The form identified Student, indicating his date of birth, age, grade level, sex, and period absences. The form failed to identify Student as a special education student, even though the form had a "special programs" section with an appropriate box to check.

21. In addition to the referral summary, the meeting packet included form reports from Student's teachers, a printout of Student's Kolb attendance record,<sup>8</sup> Student's grade report, a list detailing his reported discipline incidents, a printout of District's registration information (including Guardian's identity, mailing address, phone, and email address), and an updated health assessment summary from nurse Rafferty-Hull. Student's social studies/English teacher could not provide information about Student because of his poor attendance. The English intervention teacher reported that Student was often off task unless he was interested in the subject, had poor participation in learning new concepts, did not return homework given when he was not in attendance, and had been in class only six days. The physical education teacher reported Student's attitude was satisfactory but that he had missed too much school to provide further comment. The math/science teacher reported Student's effort, conduct, and attitude were satisfactory, noting that Student follows directions when present. The nurse's updated report noted that Student had been absent from school since February 14, 2012.

22. Kolb forwarded the attendance review board referral packet to District's Child Welfare and Attendance office, where Ms. Brantley and her staff processed the paperwork in anticipation of conducting an attendance review board hearing. The attendance review board proceeding was not an expulsion process, for which Ms. Brantley was District facilitator. The attendance review board proceeding addressed attendance issues. As confirmed by Ms. Brantley's testimony, a student's regular school attendance was part of the students' code of conduct at District.

23. District's attendance review board issued a subpoena requiring Guardian's and Student's attendance at the hearing on April 10, 2012. The subpoena stated that the hearing was for the purpose of proposing or promoting alternatives to juvenile or criminal court action and, further, warned that failure to appear would result in an immediate request for referral to the District Attorney.

24. In preparation for the hearing, a clerk entered the date, Student's name, Student's District identification number, and the name of Student's school on a standard District attendance review board contract form, consisting of a white original (review board file), a yellow copy (school file) and a pink copy (student/parent). The remainder of the form was left blank. The contract form had three action sections -- for the student, for the parent or guardian, and for the review board. Each action section contained various action statements next to a check box, with a signature line at each section's bottom. The lower quarter of the contract form stated that it was a contract, with spaces to record the duration of

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<sup>8</sup> Guardian stated on several occasions that District's attendance records were inaccurate and that many of the absences had been excused. Student did not, however, introduce evidence regarding the alleged inaccuracies, such as notes from his healthcare providers or Guardian. Absence such evidence, District's attendance records for Student were accepted as accurate for purposes of this hearing.

the contract, other officials who were present when signed, and the location of the contract's execution.

25. Guardian appeared for the April 10, 2012 hearing, but Student did not. The hearing was held in District's school board chambers. In her capacity as chairperson, Ms. Brantley met Guardian and showed her to a seat. The panel introduced themselves and called Student's case. Guardian testified that a panel member stated Guardian had not brought Student to school and that she might be subject to criminal prosecution for failing to do so. Guardian told the review board that Student was on an IEP and said that District did not follow the IEP. She also said that she was homeless, had serious transportation issues, and could not get Student in the car for school. Guardian told the review board that District did not reasonably provide education to Student, that Student required intensive psychological services, and that she was doing everything possible to get Student educated with the proper services. Guardian recalled that the review board panel was very aggressive, indicating it was her responsibility to get Student to school.

26. As the review board panel made its decisions during Student's hearing, Ms. Brantley checked the applicable boxes on the contract form. In Student's action section, Ms. Brantley checked one box – "I will attend school and all classes on time. Obey school rules." In Guardian's action section, three boxes were checked, stating that Guardian would: (1) Require her child to attend school and all classes on time each scheduled school day; (2) Cooperate fully with school officials and attend all meetings that were scheduled; and (3) Provide doctor verification when Student was ill or send Student to school to have the nurse verify any illness. The review board action section had three checked boxes: (1) Monitor Student's attendance and behavior; (2) Refer student to San Bernardino County Office of Education's Bob Murphy Community Day School (Bob Murphy); and (3) Issue a citation to both Student and Guardian for court appearance if the contract was violated. The contract indicated that it was valid through high school graduation.

27. At the conclusion of Student's hearing, Ms. Brantley signed the review board action section as the Chairperson. She wrote "not present" on the signature line for the Student action section. She then reviewed the form with Guardian and had her sign the Guardian action section. She gave Guardian the pink Student/Parent copy of Student's completed contract. Guardian claimed at hearing that only the Student and Guardian action sections were completed when she signed the form. However, Ms. Brantley's convincingly testified that the review board contract process she employed at the time of Student's hearing was a standard practice, since she had repeated the same procedure for every student in each attendance review board hearing for two years. Thus, when Ms. Brantley presented the form to Guardian for signature, the contract was completely filled out. Guardian received a copy of the completed contract.

28. Student's contract did not clearly state that the referral to Bob Murphy was conditioned on whether Student thereafter attended school. Ms. Brantley testified, however, that the review board panel informed Guardian that if Student failed to attend school, District would remove him from Kolb and refer him to Bob Murphy. Further, Ms. Brantley went

over the contract with Guardian. Therefore, the contract and the attendance review board hearing process provided Guardian with sufficient notice that Student would be referred to Bob Murphy if he failed to attend school.

29. Student did not attend school after the review board hearing and was in violation of the contract. Therefore, Ms. Brantley drafted an April 19, 2012 letter to Guardian, informing her that Student was referred to Bob Murphy for the remainder of the spring semester for the 2011-2012 school year and the fall semester of the 2012-2013 school year. The letter directed Guardian to contact Bob Murphy as soon as possible for registration. The letter concluded by stating that the “placement” was until January 2013 or until Student met the requirements of 90 percent attendance, good behavior and a 2.0 or better grade point average. Then, Student could be considered for readmission to District. Guardian came into District’s offices on April 19, 2012, at which time Ms. Brantley personally provided Guardian with the letter.

30. District’s attendance review board used Bob Murphy as a community day school to which the review board was empowered to refer habitual truants, as defined by Education Code, section 48262. Once the attendance review board referral was made, Ms. Brantley’s offices processed the truant like that of a student being referred to a different placement as a disciplinary assignment. District would disenroll the truant from its school and refer the truant to Bob Murphy. Like any public school placement, the parent would have the option of using a private or charter school instead of Bob Murphy. Ms. Brantley stated District sometimes used schools other than Bob Murphy, which did not support a program for students with emotional disturbance.

31. On April 19, 2012, District faxed a Community Day School Referral Form to Bob Murphy. The San Bernardino County Superintendent of schools provided the referral form. The form’s Section III, entitled “Educational History,” included a place where the referring district was to indicate if the pupil was a special education student; if so, the student’s IEP needed to be attached. On the form, Ms. Brantley’s clerk failed to indicate that Student was entitled to special education services. Ms. Brantley testified that her clerk most likely did not identify Student for special education because the attendance review board form, completed by Kolb as the cover sheet to the review board packet, failed to identify Student as a special education student. The eight-page fax was confirmed as received by Bob Murphy. District also completed a form drop slip and Student checkout form, disenrolling Student effective April 19, 2012.

32. In general, when District disenrolled and referred a special education student to a community school, for any reason, District’s special education administrator would first review and sign off on the referral. In April 2012, Alejandro Gonzalez was District’s Senior Coordinator of Special Education. When he received a county referral form for a special education student, he reviewed the special education services to which the student was entitled and arranged for proper funding of the services at the county community day school. Once he affirmed that services would be funded, he signed the county referral form and returned the materials to Ms. Brantley’s offices, which would then be authorized to formally

refer the student. Since District did not properly identify Student as a special education student, Ms. Brantley had no opportunity to affirm that Student's special education services would be funded at Bob Murphy upon referral.

33. Mr. Gonzalez worked for District from 2011 to 2013 and, at the time of hearing, was the Director of Student Services, Special Education Division, at Coachella Valley Unified School District. He held credentials as a mild/moderate special education specialist and in educational administrative services. He also held an autism authorization certificate. He explained that if District had transferred Student for any of the reasons listed on the county referral form, other than an attendance review board referral, Student would have had a manifestation determination meeting. His understanding was that District did not hold a manifestation determination when the attendance review board referred a special education student to a community day school because District did not consider attendance review proceedings to be disciplinary. He further opined that he has since concluded that a special education student is entitled to a manifestation determination before a change of placement resulting from violation of school attendance policies. If District had held a manifestation meeting, Student would not have been referred to Bob Murphy without special education services, even if his absenteeism was found not to be a manifestation of his disability.

34. George L. Bowser had been a principal for the San Bernardino County Superintendent of Schools since 1990 and, at all times relevant to this due process, was the principal of Bob Murphy. According to Mr. Bowser, and community day school's office manager Eric Johnson, Bob Murphy had no record of an April 2012 referral for Student. If the referral had come into the school's offices, Bob Murphy personnel would have contacted Guardian to begin the registration process. Also, if the referral had indicated Student was special education, the office would have confirmed receipt of Student's IEP from District before proceeding with the registration.

35. At the beginning of each school year, District's Child Welfare and Attendance office completed and forwarded new referral forms for each of its students who had been previously referred to, and who would be continuing at, a community day school. Therefore, District completed a new referral form for Student in August 2012. Unlike the April 2012 referral, this form clearly indicated that Student was entitled to special education services. Ms. Brantley did not know why her clerk corrected the August 2012 referral form to properly represent Student's special education status. The referral was then sent to Mr. Gonzalez, who explained that he was guided by the special education services a student was receiving at the time of the referral. District recommended an emotional disturbance special day class at Student's February 2012 IEP, but Guardian had not agreed to the IEP. Therefore, though Bob Murphy did not support students with emotional disturbance, Mr. Gonzalez authorized funding for Student's special education services and signed the referral form. District faxed Student's referral to Bob Murphy on August 10, 2010.

36. Bob Murphy received the referral and enrolled Student on August 10, 2012. Since the referral did not include an IEP, Bob Murphy's offices contacted District for special education documentation, which District provided.

37. Mr. Bowser had a vivid and detailed recollection of Student's behavior and attendance issues, beginning the first day Student was at Bob Murphy, August 10, 2012. Student refused to attend class and went outside, saying that he had panic and anxiety attacks and could not go to class. Mr. Bowser convinced Student to come into the office and work. One of Student's teachers provided assignments for Student, but he did not do the work. On August 13, 2012, Student was late and refused to attend class, wanting to work in the school offices all day. When Mr. Bowser and school counselor tried to transition him to class, Student refused, saying he did not like people staring at him, which would cause him to start a fight. On August 15, 2012, Student arrived late and hid around the side of a building outside the school gate. Mr. Bowser convinced Student to come into the building, but he refused to attend class. Similarly, On August 16, 17, 21, and 22, 2012, Student arrived late, refused to attend class, and remained in the school office.

38. On August 23, 2012, Student came to school at 11:30 a.m., went to the school office, refused to attend class, and wanted to leave. As he stood in the office doorway, talking to Mr. Bowser, Student picked up rocks and started to throw them at the school buildings, at windows, and eventually at cars. Mr. Bowser told him to stop; Student persisted. Mr. Bowser then suspended Student for one day and contacted Guardian, who came and retrieved Student. On August 28, 2012, Student refused to attend class and was suspended for one day for willfully defying valid authority. On August 30, 2012, Student refused to attend class; Guardian was present. School staff counseled both Student and Guardian about the necessity of Student attending class; Student still refused. He was suspended for two days. Student stopped attending Bob Murphy after September 5, 2012.

39. The school psychologist Ms. Bryant conducted a psychoeducational triennial assessment of Student, dated January 11, 2013. She noted that Student's then current IEP of March 2009 listed a primary disability of emotional disturbance. Because of Student's minimal attendance, teachers could not knowledgeably complete rating scales. Therefore, Ms. Bryant could not properly evaluate and substantiate eligibility of emotional disturbance. However, Ms. Bryant did determine that Student was eligible for special education as a student with a specific learning disability. District convened Student's triennial IEP meeting on January 14, 2013. Ms. Bryant and Mr. Gonzalez attended on behalf of District; Guardian also participated. The IEP team reviewed levels of performance and developed goals, including a goal to have Student enter and remain in a classroom for about five minutes each period. The team found Student eligible as a student with a specific learning disability and offered a placement in a special day class of students with emotional disturbance, moderate to severe, with a one-to-one support aide, at District's Frisbie Middle School. District also offered to complete a mental health evaluation, transportation, counseling services, and various accommodations. Guardian disagreed with some portions of the psychoeducational report but consented to the placement and services on March 7, 2013, following a second team meeting.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework for Violation of Student’s Code of Conduct under the IDEA*<sup>9</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (§ 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>10</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) Under the IDEA and California law, children with disabilities have the right to a free appropriate public education. (§ 1400(d); Ed. Code, § 56000.) A free appropriate public education is defined as appropriate special education, and related services, that are available to the child at no cost to the parent or guardian, that meet the state educational standards, and that conform to the child’s IEP. (§ 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child’s unique educational needs are to be broadly construed to include the child’s academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

2. Section 1415(k) and title 34 Code of Federal Regulations, part 300.530, et seq., describes the procedural rights of special education students when a violation of a code of student conduct results in a change of educational placement. (Ed. Code, § 48915.5.) For disciplinary changes in placement greater than 10 consecutive school days (or a pattern of disciplinary action that amounts to a change of placement), the disciplinary measures applicable to students without disabilities may be applied to a special education student if the conduct resulting in discipline is determined not to have been a manifestation of the special education student’s disability. (§ 1415(k)(C); 34 C.F.R. §§ 300.530(c) & 300.536(a)(1) & (2).)

3. A parent of a special education student may request an expedited hearing to challenge whether a manifestation determination meeting was properly conducted prior to changing a student’s placement. (§ 1415(k)(H)(3)(A); 34 C.F.R. 300.532(a) & (c).) The hearing must be conducted within 20 school days of the date an expedited due process hearing request is filed and a decision must be rendered within 10 school days after the hearing ends. (§ 1415(k)(H)(4)(B); 34 C.F.R. 300.532(c)(2).)

4. A decision made by a hearing officer shall be made on substantive grounds based upon a determination of whether a child received a FAPE. (§ 1415(f)(3)(E)(i).) In matters alleging procedural violations, a denial of FAPE may be found only if the procedural violations impeded the child’s right to FAPE, significantly impeded the parents’ opportunity

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<sup>9</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>10</sup> All references to the Code of Federal Regulations are to the 2006 version.

to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (§ 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2) & 300.532(c) [rules for expedited hearings are to be consistent with those of other IDEA hearings, including analysis of procedural defect issues]; Ed. Code, § 56505, subd. (f)(2).)

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

*Issue 1: Was a manifestation determination meeting required?*

6. In Issue 1, Student contends that District was required to convene a manifestation determination meeting when the review board chose to change Student's placement because of excessive absenteeism, a violation of a student code of conduct. District asserts that the attendance review board process is designed to keep students in school, not expel or suspend them, and is therefore not a disciplinary process that mandates a manifestation determination meeting. For the reasons set forth below, District was obligated to conduct a manifestation determination, as proscribed by section 1415(k)(1)(E), because Student was a special education student, and District changed his placement based on a violation of a student code of conduct.

7. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042(a).) A "change of placement" is a fundamental change in, or elimination of, a basic element of a pupil's educational program. A change of placement is defined as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that cumulate to more than 10 consecutive school days and constitute a pattern based on listed factors. (34 C.F.R. § 300.536(a).)

8. When a district seeks to change a special education student's educational placement for more than 10 days as a result of a violation of a student code of conduct, the district must convene a meeting with relevant members of the child's IEP team to determine whether the child's violation was a manifestation of the child's disability. (§ 1415(k); 34 C.F.R. § 300.530 .) This is known as a manifestation determination. (§ 1415(k)(1)(E).) A manifestation determination must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*) If it is determined that the student's conduct was a manifestation of the student's disability, the district must proceed differently than that of a non-disabled student, involving the student's IEP team and addressing any failures in IEP implementation. (§ 1415(k)(1)(F); 34 C.F.R. § 300.530(e)(3).)

9. The manifestation determination is not an IEP team meeting and different rules apply to notice and attendance requirements. A manifestation determination must be made by the school district, the parent, and relevant members of the IEP team as determined

by the parent and the school district. (§ 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1) & (h).) A school district must notify parents of a manifestation determination review team meeting early enough to ensure that they will have an opportunity to attend, and must schedule the meeting at a mutually agreed upon time and place. (34 C.F.R. § 300.322(a)(1), (2); Ed. Code, § 56341.5, subds. (a)-(c).) In the case of a manifestation determination review team meeting, the notice must inform the parent of the decision to change the student's placement and must be accompanied by a copy of the parent's procedural safeguards. (§ 1415(k)(1)(H).)

10. Conduct is a manifestation of the student's disability: (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or (ii) If the conduct in question was the direct result of the local education agency's failure to implement the student's IEP. (34 C.F.R. § 300.530(e)(1) & (2).) The student's behavior as demonstrated across settings and across times is analyzed in the manifestation determination. All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (§ 1415(k)(E); 34 C.F.R. § 300.530(e)(1).)

11. If it is determined that the student's conduct was a manifestation of the student's disability, the IEP team reviews and modifies the student's IEP to address the behavior and returns the student to the special educational placement from which the student was removed, unless the parent and the local education agency agree to a change of placement. (§ 1415(k)(1)(F).) If it is determined that the student's conduct was a manifestation of student's disability because the conduct was the direct result of the school district's failure to implement student's IEP, the district must remedy the failure. (34 C.F.R. § 300.530(e)(3).)

12. If it is determined that the student's conduct was not a manifestation of the student's disability, then regular school disciplinary procedures may be used to address the incident in the same way the procedures would be applied to non-disabled students. (§ 1415(k)(1)(C); 34 C.F.R. § 300.530(c).) However, irrespective of whether the behavior is determined to be a manifestation of the student's disability, a student who is removed from his current placement shall continue to receive special education services, enabling the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the student's IEP goals. (§ 1415(k)(1)(D); 34 C.F.R. § 300.530(d).)

13. District asserts that the manifestation determination process applies only to disciplinary proceedings. For example, section 1415(k)(1)(C) states that if it is determined the violation of the school code is not a manifestation of the student's disability, "the relevant *disciplinary* procedures" may then be applied (emphasis added). Similarly, 34 Code of Federal Regulations part 300.530(c) refers to "*disciplinary* changes in placement that would exceed 10 days" as a condition to a manifestation determination meeting (emphasis added).

Thus, according to District, because the attendance review board process is designed to keep a child in school, not to suspend or expel the student, a manifestation determination meeting need not be held. However, though not characterized as a disciplinary proceeding, an attendance review board is empowered to impose serious consequences in the case of habitual or chronic truants.

14. According to Education Code section 48200, pupils of ages six through 18 years old are subject to compulsory full-time education, unless otherwise exempted. In 1976, the California State Legislature enacted the student attendance review board legislation (Ed. Code, §§ 48320–48325) to establish panels that would develop effective ways to address absenteeism and reduce student dropout rates. When a minor becomes a habitual truant (Ed. Code, § 48262), a district may refer the student to an attendance review board.

15. If interventions are unsuccessful in gaining a student’s attendance, the attendance review board can have a criminal complaint filed against the parent or guardian (Ed. Code, § 48291) that may include financial penalties (Ed. Code, § 48293). The attendance review board may notify the district attorney or probation officer, who will contact parent and pupil to discuss the potential legal consequences of the continued truancy (Ed. Code, § 48263.5), including arrest of the truant (Ed. Code, § 48264) and other penalties against truant if deemed a ward of the court (Ed. Code, § 48264.5). If a pupil continually and willfully violates attendance review board directives, the school district may request a citation be issued to the pupil, thus involving the juvenile court (Welf. & Inst. Code, § 601(b); Ed. Code, § 48265). The attendance review board is also empowered to utilize involuntary transfer and referral to a community day school (Ed. Code, §§ 48662(a) and (b)(3)).

16. When community resources fail to reduce absenteeism at a student’s school (Ed. Code, § 48260.5) and the truancy continues, the attendance review board will take more consequential steps. Here, as Student’s truancy persisted, District gave Guardian regular warnings, scheduled an attendance review team meeting, and finally referred Student and Guardian to District’s attendance review board, which scheduled a hearing. At the review board hearing, Guardian was informed that if Student’s truancy continued, District would refer him to Bob Murphy. When Student thereafter failed to attend his school, the review board chairperson notified Guardian that District disenrolled Student from his middle school placement at Kolb, effective April 19, 2012, and referred him to the county community day school, Bob Murphy. District’s notification also stated that the new “placement” was until January 2013. As Ms. Brantley noted, District also referred expelled students to Bob Murphy. Therefore, though the legislature may not have designed the attendance review board process as a disciplinary proceeding, the review board possessed powers to impose or initiate consequences for habitual or chronic truancy that are punitive in nature.

17. Holding a manifestation determination meeting, when an attendance review board considers a change of placement of a child with a disability, is consistent with the public policy purpose of the IDEA and the responsibilities assumed by districts when addressing the special education needs of students. The Superintendent of Public Instruction

is required to establish, coordinate, and administer a state school attendance review board for the purpose of making annual recommendations, including uniform guidelines to achieve the attendance review board legislation's goals. (Ed. Code. § 48325, subd. (c).) Accordingly, in furtherance of its guideline mandate, the State school attendance review board prepared a model handbook for California attendance review boards, entitled "A Road Map for Improved School Attendance and Behavior," which includes suggested policies, processes, and forms.<sup>11</sup> In Chapter 8, Frequently Asked Questions, the handbook states:

The IDEA requires schools to address the behaviors of special needs pupils, such as attendance issues, when such behavior impedes the pupil's learning. Title 34, Code of Federal Regulations (CFR) Section 300.324 requires the IEP team to consider the use of behavioral interventions and supports and other strategies to address the behavior. The [review board] process provides a means by which the school may ensure that all appropriate interventions have been considered. Interventions proposed may be included in the pupil's IEP.

...

Under the IDEA . . . , a change of placement recommended by a [review board] cannot be implemented until an IEP . . . team conducts a manifestation determination review to determine if the child's conduct is a manifestation of the child's disability, and approves the placement.

Title 34, Code of Federal Regulations (CFR) Section 300.530(e) requires an IEP team to convene within 10 school days of any decision to change a pupil's placement to determine whether the behavior that prompted the decision was caused by, or had a direct and substantial relationship to, the child's disability or directly resulted from the school's failure to implement the IEP.

18. The Handbook is a recommendation of good practices consistent with the School Attendance Review Board legislative goals, and is not binding. However, the State school attendance review board's comments regarding the need for a manifestation determination, when a review board is recommending change of placement for a child with a disability, are insightful and persuasive. In such circumstances, the manifestation determination is also consistent with one of the main purposes of having attendance review boards; that is, to ensure that all appropriate interventions are utilized. The manifestation

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<sup>11</sup> The San Bernardino County Superintendent of Schools publishes the State School Attendance Review Board handbook.

meeting determines if the IEP team needs to be part of the attendance review board's intervention efforts.

19. Student's change of placement was a consequence of his habitual truancy, a violation of the code of student conduct to regularly attend school. A change in placement resulting from a violation of a code of student conduct that exceeds 10 days requires a manifestation determination. (§ 1415(k); 34 C.F.R. § 300.530 .) Here, the change in placement was for eight months. Therefore, Student's change of placement falls within the parameters of section 1415(k), entitling him to a manifestation determination.

20. Though this expedited appeal is not addressing the provision of FAPE, the rules for a due process hearing under section 1415(k) are to be consistent with those of other IDEA hearings, including analysis of procedural defect issues. (34 C.F.R. § 300.532(c).) District's failure to convene a manifestation determination meeting impeded Guardian's opportunity to participate in a manifestation determination meeting. This is similar to significantly impeding a parent's opportunity to participate in the decision-making process at an IEP team meeting regarding the provision of a FAPE to the parent's child, which is a procedural violation that may support a finding that the child was denied a FAPE. (§ 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2)(ii).) Accordingly, Student has met his burden of proving that the failure to conduct a manifestation determination deprived Guardian of her right to participate in the decision-making process.

*Issue 2: Was Student's conduct a manifestation of his disability?*

21. In Issue Two, Student contends that if District had convened the required manifestation determination meeting, the relevant members of the IEP team would have found his absenteeism to be a manifestation of his disability. District asserts that Student did not meet his burden of demonstrating his truancy was a manifestation of his disability because Student failed to submit persuasive admissible evidence in support of the assertion. For the reasons set forth below, Student has met his burden of demonstrating that his truancy was a manifestation of his disability.

22. All relevant information in the student's file, including the IEP, observations of teachers, as well as relevant information from the parents, must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (§ 1415(k)(E); 34 C.F.R. § 300.530(e)(1).) Here, substantial and persuasive evidence demonstrated that Student's absenteeism was caused by, or had a direct and substantial relationship to, Student's disability.

23. Student's conduct at Kolb quickly substantiated Guardian's warning that Student would be anxious and refuse to attend classes. District's detailed disciplinary reports of January 17, 23, 30, and 31, 2012, document Student's increasing resistance to class and school attendance. Student strongly resisted any authoritative attempts to have him attend

class, including threatening physical harm to security officers and school staff. He roamed about campus, disrupted classes, threateningly carried sharp objects, swore at security officers, spit and pounded on school property, required physical restraint, left the school campus, and ran into the street.

24. Student's then current IEP of March 2009 provided an eligibility of emotional disturbance. At Student's February 17, 2012 IEP, District recommended eligibility of emotional disturbance, referring to a psychological report of November 24, 2008. District was aware of Student's class and school avoidance, having used the disciplinary record in preparing Student's behavioral baseline. District proposed a behavioral goal to encourage class attendance, a behavior intervention plan, a one-on-one aide, and placement in a special day class for students with emotional disturbance, three periods a day.

25. As of February 2012, District was well aware of Student's class and school avoidance activities, having cited Student's conduct in the development of the IEP. By proposing a behavior goal to address Student class avoidance, District recognized that the IEP team needed to address Student's attendance behaviors as part of his special education placement and services. District had determined that Student's refusal to attend class and school were related to his disability and needed to be addressed by appropriate goals and a behavior intervention plan.

26. If District had properly convened a manifestation determination meeting in April 2012, the relevant members of Student's IEP team (including Guardian) would have reviewed Student's November 2008 psychological report, the March 2009 IEP, District's proposed eligibility, placement, and services from the February 2012 IEP, the disciplinary reports, and any other records in Student's education file. This documentation demonstrates that Student's school avoidance, which was the basis of District's student attendance review board's change of placement, was caused by, or had a direct and substantial relationship to, Student's disability.

27. Since the violation of a code of student conduct was a manifestation of Student's disability, Student's IEP team should have reviewed and modified the IEP to address Student's behavior, as well as return Student to his placement at Kolb, unless the IEP team agreed otherwise. (§ 1415(k)(1)(F).) Instead, District disenrolled Student from Kolb and improperly referred him to Bob Murphy.

28. Bob Murphy was also an inappropriate placement since, as affirmed by Ms. Brantley and Mr. Bowser, Bob Murphy did not provide support or special day classes for students with an emotional disturbance. Student's eligibility was emotional disturbance, District's proposed emotional disturbance as Student's eligibility in the February 2012 IEP, and District offered placement in a special day class for students with emotional disturbance. Therefore, placement at Bob Murphy was contrary to District's IEP offer of placement and services. Bob Murphy was ill equipped to address Student's special education needs, as demonstrated by Student's conduct. District's improper referral of Student to Bob Murphy, which was an inappropriate placement, denied Student a FAPE. District did not offer

another placement until Student's triennial IEP in January 2013, which was agreed to by Guardian in March 2013.

29. In sum, District was obligated to conduct a manifestation determination meeting, as required by section 1415(k)(1)(E), because District's attendance review board changed Student's placement based on violations of the code of student conduct regarding regular attendance. Student met his burden of showing that Guardian was deprived of her right to participate in the decision making process. Student also met his burden of showing that had the meeting been held, his conduct would have been determined to be a manifestation of his disability. District therefore improperly referred Student to an inappropriate placement. The duration and degree of District's denial of a FAPE because of its improper referral of Student to Bob Murphy shall be addressed and determined in the non-expedited portion of this due process proceeding.

## REMEDIES

1. Student acknowledges that more than two years have passed since the attendance review board hearing and that the contemplated statutory remedy is no longer viable. Therefore, Student requests that he be awarded substantial compensatory education as a remedy for District's failure to conduct a manifestation determination and, since Student's conduct was a manifestation, improper referral to Bob Murphy. Student cites no authority in this regard, other than to refer to the equitable powers IDEA grants the administrative law judge in fashioning remedies in due process proceedings.

2. In general, following an expedited hearing the administrative law judge shall make a determination of the issues on appeal and, as a remedy, may order a change of placement of the child, by returning the child to the placement to which the child was removed or by changing placement of the child to an appropriate interim alternative educational setting for not more than 45 days if the current placement is substantially likely to result to injury to the child or others. (§1415(k)(3)(B)(ii).) However, school districts may be ordered to provide additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524. )

4. The IDEA does not require compensatory education services to be awarded directly to a student, such that staff training is an appropriate remedy. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may

include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.* Also, e.g., *Student v. Reed Union School Dist.*, (Cal. SEA 2008) 52 IDELR 240 [109 LRP 22923; Cal.Ofc.Admin.Hrngs. Case No. 2008080580] [requiring training on predetermination and parental participation in IEP's]; *Student v. San Diego Unified School Dist.* (Cal. SEA 2005) 42 IDELR 249 [105 LRP 5069] [requiring training regarding pupil's medical condition and unique needs].)

5. Here, though Student was entitled to special education placement and services, District personnel did not convene a manifestation determination meeting when the attendance review board decided to change Student's placement as a result of chronic truancy, thus denying Student and Guardian the procedural protections provided by sections 1415(k)(1) and (2). Student's attendance history would indicate that he may again be subject to an attendance review board proceeding and a change of placement consideration, which would require a manifestation determination meeting. Further, since the District's conduct was a matter of policy and not merely a failure to follow procedures, other special education students are likely to be deprived of a manifestation determination meeting upon a change of placement by District's attendance review board.

6. Therefore, in order to assure that Student and other special education students are afforded the procedural protections to which they are entitled, District shall train District personnel who are involved with the attendance review board proceedings, regarding the procedural safeguards provided by section 1415(k) for purposes of assuring that District convene a manifestation determination meeting whenever District's student attendance review board seeks to change a special education student's educational placement for more than 10 days as a result of absenteeism or truancy.

7. Since Student's truancy was shown to be a manifestation of his disability, District was not permitted to apply the attendance review procedures to Student in the same manner and for the same duration as such procedures would apply to children without disabilities. Therefore, District improperly referred Student to an inappropriate placement. The duration and degree of District's denial of a FAPE because of its improper referral of Student to Bob Murphy, as well as an appropriate remedy, shall be addressed and determined in the non-expedited portion of this due process proceeding. All issues regarding whether Student was provided a FAPE after the date of the student attendance review board decision to change his placement are reserved for the non-expedited portion of this due process proceeding.

## ORDER

1. Within 90 days, District shall train its personnel, who are or may be involved with the attendance review board proceedings, as to the procedural safeguards provided by section 1415(k) to assure that District timely convenes a manifestation determination meeting whenever District's student attendance review board seeks to change a special

education student's educational placement for more than 10 days as a result of absenteeism or truancy.

2. District shall expunge Student's educational records by purging all references to the April 2012 student attendance review board's referral to Bob Murphy as a consequence of a violation of a code of student conduct.

3. All issues regarding the duration and degree of District's denial of a FAPE because of its improper referral of Student to Bob Murphy, after the date of the attendance review board decision to change his placement, are reserved for the non-expedited portion of this due process proceeding.

### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on Issues One and Two.

### RIGHT TO APPEAL THIS DECISION

This was a final administrative Decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: August 13, 2014

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/s/  
CLIFFORD H. WOOSLEY  
Administrative Law Judge  
Office of Administrative Hearing